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26 **UNITED STATES DISTRICT COURT**  
27 **NORTHERN DISTRICT OF CALIFORNIA**

28 ERICA FRASCO, et al.,

Plaintiffs,

v.

FLO, HEALTH, INC., GOOGLE, LLC,  
FACEBOOK, INC., APPSFLYER, INC., and  
FLURRY, INC.,

Defendants.

Case No. 3:21-cv-00757-JD (consolidated)

**DECLARATION OF KENT M.  
WILLIAMS IN SUPPORT OF MOTION  
TO STRIKE FLO HEALTH, INC.'S  
AFFIRMATIVE DEFENSES**

Judge: Hon. James Donato  
Court: Courtroom 11 – 19th Floor

Action Filed: January 29, 2021  
Trial Date: Not Set

## **DECLARATION OF KENT M. WILLIAMS**

I, Kent M. Williams, declare as follows:

1. I am one of the counsel representing Plaintiffs in the above-captioned action.

4 Unless otherwise indicated, I have personal knowledge of all statements contained herein.

2. On September 2, 2021, Plaintiffs filed their Consolidated Class Action Complaint, alleging fourteen separate claims. ECF No. 64.

3. On October 1, 2021, the Court entered a Scheduling Order setting a discovery deadline of October 14, 2022, and a deadline for expert reports of November 3, 2022. ECF No. 76 at 2.

4. On or about November 1, 2021, Flo Health, Inc. (“Flo”) moved to dismiss the entirety of the Consolidated Complaint on various grounds, including for failure to state a claim and lack of standing. ECF No. 93. The other defendants also moved jointly to dismiss the consolidated Class Action Complaint. ECF No. 86.

5. On June 6, 2022, the Court dismissed with leave to amend all of the claims against Defendant AppsFlyer, the unjust enrichment claims against Meta Platforms, Inc. (f/k/a Facebook, Inc.) (“Meta”), Google, LLC (“Google”) and Flurry, Inc. (“Flurry”), and the Stored Communications Act claim against Flo. ECF No. 158. The Court held that the rest of Plaintiffs’ claims were adequately pled, rejected each of Defendants’ other arguments, and denied the balance of Defendants’ motion. *Id.*

6. Plaintiffs did not amend and thus thirteen of Plaintiffs' claims remain in this case:  
Count 1 (Violation Common Law Invasion of Privacy – Intrusion Upon Seclusion) (Against Flo  
only); Count 2 (Invasion of Privacy and Violation of the California Constitution, Art. 1, § 1)  
(Against Flo only); Count 3 (Breach of Contract) (Against Flo only); Count 4 (Breach of Implied  
Contract)(Against Flo only); Count 7 (Violation of California Confidentiality of Medical  
Information Act (Against Flo Health only); Count 8 ((Violations of Cal. Bus. & Prof. Code §§  
17200 *et. seq.*) (Against Flo Health); Count 9 (Violations of Cal. Bus. & Prof. Code §§ 17200 *et.  
seq.*)(Against Meta, Google, and Flurry); Count 10 (Aiding and Abetting Violations of Cal. Bus.

1 & Prof. Code §§ 17200 *et. seq.*) (Against Meta, Google and Flurry); Count 11 (Aiding and Abetting  
 2 Violation Common Law Invasion of Privacy – Intrusion Upon Seclusion) (Against Meta, Google  
 3 and Flurry); Count 12 (Violation of the Federal Wiretap Act (Against Meta, Google, and Flurry);  
 4 Count 13 (Violation of the California Invasion of Privacy Act) (Against Facebook, Google, and  
 5 Flurry); and Count 14 (Violation of the Comprehensive Computer Data Access and Fraud Act)(  
 6 Against Flo Health, Facebook, Google, and Flurry).

7       7. On August 8, 2022, Defendants Flo, Meta, and Google filed Answers and  
 8 Affirmative Defenses. *See* ECF Nos. 173-75. For the Court’s convenience, pertinent sections from  
 9 each Defendant’s Answer are attached *See* Exhibit A (Flo Answer), Exhibit B (Meta Answer),  
 10 and Exhibit C (Google Answer) attached hereto.

11       8. The defenses among the three defendants overlap significantly. Some even use  
 12 identical language. A number of Flo’s defenses appear to be copied from Meta’s pleading, with  
 13 few if any changes. *See* Exhibit D attached hereto (chart of Flo’s affirmative defenses and the  
 14 corresponding defenses of the other two defendants); *see also* Flo Def. Nos. 23, 27 & 30 (which  
 15 refer to “Meta” instead of Flo).

16       9. On Friday, August 19, 2022, I notified counsel for Flo, Meta and Google that  
 17 Plaintiffs objected to their respective affirmative defenses because most do not identify any facts,  
 18 fail to provide fair notice of supporting facts or the claims to which they apply, or suffer from other  
 19 deficiencies. For each type of objection, I included examples of specific defenses that we consider  
 20 invalid. I also provided caselaw supporting our position, and for each defendant I followed up  
 21 with a detailed explanation of our objections to each affirmative defense that we challenged.

22       10. Counsel for Meta and Google expressed a willingness to discuss our objections. In  
 23 a series meet and confers held separately with counsel for each of these defendants, I further  
 24 explained our objections and answered questions about them. I explained that many enumerated  
 25 defenses were improper “negative” defenses redundant of previous denials, and/or failed to allege  
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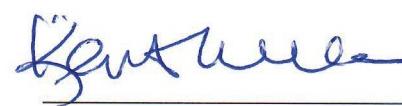
1 facts or identify the claims to which they apply, sufficient to put Plaintiffs on “fair notice” of the  
 2 substance of the defenses. On behalf of Plaintiffs I demanded that each of them strike the  
 3 “negative” defenses, and either amend or strike the remainder that were objectionable. Meta has  
 4 informed Plaintiffs that it will amend its answer today (Monday, August 29, 2022), and Plaintiffs  
 5 entered into a stipulation with Google to briefly extend the applicable deadlines while the parties  
 6 work through the unresolved objections. *See* ECF No. 180.

7       11. On August 26, 2022, I met and conferred with Flo’s counsel. Flo’s counsel  
 8 questioned the importance of determining the validity of Flo’s affirmative defenses, and asked  
 9 what the prejudice to Plaintiffs would be if the defenses were not amended, which I answered in a  
 10 follow-up email. Also, although I already provided caselaw, Flo’s counsel demanded even more  
 11 authority supporting our position. Flo’s counsel did provide limited additional facts regarding one  
 12 or two of Flo’s defenses, but refused to add those facts to Flo’s pleading. When I noted that most  
 13 of Flo’s defenses also do not state the claims to which they apply, Flo’s counsel retorted, “all of  
 14 them.” Shortly thereafter, Flo’s counsel refused to discuss the defenses further. Counsel for both  
 15 sides agreed they had reached an impasse and terminated the call.

16       12. The next day, i.e. on Saturday, August 27, 2022, co-counsel for Flo reiterated that  
 17 “this is a super unproductive and baseless exercise for the plaintiffs” and asserted that “in 32 years  
 18 of practice, this is the first time I’ve ever had an opposing counsel complain about affirmative  
 19 defenses, much less threaten a motion about them.” Nonetheless, Flo’s counsel proposed waiting  
 20 another week to “see” if the parties could reach agreement on the defenses. Without a concrete  
 21 proposal from Flo or some other indication that Flo (like Meta and Google) is willing to amend at  
 22 least some of its defenses, the proposal to extend the time for a motion was rejected. This motion  
 23 followed.

24           I declare under penalty of perjury under the laws of the United States that the foregoing is  
 25 true and correct.

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2 Dated: August 29, 2022  
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Kent M. Williams